Supreme Court of the United States.

OCTOBER TERM, 1877.

NO. 198.

CHRISTOPHER G. PEARCE AND WILLIAM KNIGHT, CLAIMANTS OF THE STEAMBOAT LADY PIKE; WILLIAM F. DAVIDSON AND PEYTON S. DAVIDSON, THEIR STIPULATORS,

Appellants,

vs.

THE GERMANIA INSURANCE COMPANY,
THE NIAGARA INSURANCE COMPANY,
THE HANOVER INSURANCE COMPANY, AND
THE REPUBLIC INSURANCE COMPANY,

Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Wisconsin.—In Admiralty.

BRIEF AND ARGUMENT FOR APPELLANTS.

By JAMES H. DAVIDSON AND
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H. M. Smyth & Co., Printers, St. Paul.

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STATEMENT OF THE CASE.

The appellees are corporations organized and doing business under the laws of New York.

In the month of April, 1866, the Steamboat Lady Pike, with the barges Trout, Widgeon, and Salmon in tow, said barges all being owned by the Western Union Railroad Company, made a contract to transport about 20,000 bushels of wheat from Shakopee, in the State of Minnesota, to Chicago, Illinois—the vessels to transport it from place of shipment to Savanna, Illinois, and the Western Union Railroad Company thence to the Northwestern Elevator in Chicago, at twenty cents per bushel, *through*.

The record does not disclose the respective interests of the owners of the steamboat and the barges, in the freight to be earned for the transportation of the grain.

On the trip by river, a part of the grain which had been ladened on board the barge Salmon, was wrecked and lost by a collision against one of the stone piers for a railroad bridge, in the Mississippi river, within the limits of the city of Saint Paul. The accident and loss of the grain in the barge Salmon occurred April 24th, 1866.

The grain was insured in an open cargo policy of the appellees, and subsequently, and some time in July, 1866, they paid $8,100 to the insured, and on the 9th day of October, 1866, the appellees caused a libel against the Steamboat Lady Pike, and the barge Sal-

mon, to be filed in the District Court of the United States, for the District of Wisconsin, at Milwaukee. (*See pages 2 and 3 of Record.*)

A monition duly issued against both of said vessels (*pages 4 and 5 of Record*), and on the 18th day of October, 1866, the Steamboat Lady Pike was attached thereunder at the port of La Crosse, Wisconsin, and the case was made returnable November 1st thereafter. (*See U. S. Marshall's return, page 5 of Record.*)

On October 27th, Henry Lourey, owner of the Steamboat Lady Pike, appeared as claimant, and having presented proper proofs of ownership, the Steamboat Lady Pike was "adjudged to belong as claimed," and he filed his stipulation with one Samuel Marshall, as surety, in the sum of ten thousand dollars, for the release of the Lady Pike, whereupon a warrant of restitution issued, and on October 30th, the Lady Pike was released from arrest. (*See pages 5 and 6 of Record.*)

There never was any other claimant of the Lady Pike decreed by the court, and she was never returned to its custody. Time to answer was, ~~by consent~~ on motion, extended to February 1st, 1867. (*Bottom of page 6, Record.*)

No answer was ever filed on behalf of the claimant, and on February 2d, *he being then in default*, Christopher G. Pearce, William W. Hanley, and William Knight, intervened for their interest therein, and claimed to be the owners of the Lady Pike, and the Western Union Railroad Company intervened for its

interest therein, and claimed to be the owner of the barge Salmon—all these parties appearing by the same Proctors, and filed one answer to the libel. This answer put at issue certain allegations of the libel, and set out that the loss of the grain was caused by a peril of navigation, excepted against in the bill of lading, &c. (*See pages 7 and 8 of Record.*)

There was no decree or order of court admitting any of these parties as claimants, nor any stipulation for costs, in compliance with Rule 34 of this court, where parties intervene for their interest in an admiralty proceeding.

After the filing of this answer on behalf of these intervenors, and on the 8th day of February, Mr. Lynde, one of the Proctors for the claimant, Henry Lourey, and also one of the Proctors for these several intervenors, appeared in court (*See bottom page 8, Record*); and "on his motion, it is ordered by the court that the stipulation with William F. Davidson and Peyton S. Davidson, dated January 27th, 1867, in the sum of $16,000, herein this day filed, be substituted for, and be in lieu of, a stipulation of Samuel Marshall, on file in this case, *and which is now returned to him.*"

This stipulation appears on pages 8 and 9 of Record, and recites, "Whereas, the said Steamboat Lady Pike is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel, as appears from said process, now on file in said court," * * * and presents Ephraim G. Pearce and William Knight as the claimants of said steamboat, and William F. Davidson and Peyton S. Davidson as sure-

ties, and purports to bind them in the sum of $16,000 to "abide and answer *the decree of the said court* in the aforesaid cause."

After the issues were thus made up by the allegations contained in the answer of the intervenors, a large amount of evidence was taken, and the case tried in "the said court," and a decree rendered therein dismissing the libel, and for costs.

The case was appealed to the Circuit Court of the United States for that district, and a large number of additional depositions were taken, the case tried, and a decree rendered affirming the decree of the District Court dismissing the libel, and for costs.

The libellants prosecuted an appeal to this court, and at the October Term, 1874, the case was heard and reversed, and was remanded to the Circuit Court, "with directions to enter a decree for the libellants, and for further proceedings to be had therein in conformity with the opinion of this court, 7th December, 1874."

The mandate of this court, issued to the court below, January 25th, 1875, (*see page 122 Record,*) directing, among other things, that "further proceedings be had in said cause, in conformity with the opinion and decree of this court, *as according to right and justice* and the laws of the United States ought to be had, the said appeal notwithstanding."

The mandate having been filed in the Circuit Court, and a reference had to a Master to compute the damages, on the filing of his report and confirmation thereof on motion of libellants' proctors, Messrs. Cot-

trill and Cary, a final decree was rendered, adjudging "that the libellants do have and recover of the claimants, Ephraim G. Pearce and William Knight, and William F. Davidson and Peyton S. Davidson, their stipulators, the sum of $13,190.40, the amount so reported due by the master, together with their costs," &c. (*See page 126 Record.*)

From this final decree Christopher G. Pearce (against whom judgment had been rendered by the name of Ephraim G. Pearce) and William Knight, intervenors, and William F. Davidson and Peyton S. Davidson, their stipulators, appealed to this court.

The object of this appeal is to reform the decree in the Circuit Court, so that it shall be entered against the proper parties, the claimant of the Lady Pike, Henry Lourey, and his stipulator, Samuel Marshall, and to relieve the parties against whom final judgment was erroneously entered, or in the event of failure to get them relieved, to secure the entry of a final decree against the Western Union Railroad Company, owner of the barge Salmon, and William W. Hanley, one of the alleged owners of the Steamboat Lady Pike.

THE QUESTIONS INVOLVED ARE.

1st. Should not a final decree have been entered against Henry Lourey, claimant and owner of the Steamboat Lady Pike, and Samuel Marshall, his stipulator?

2d. Was it not erroneous to enter a final decree against Christopher G. Pearce (or Ephraim G. Pearce) and William Knight, intervenors, and William F. Davidson and Peyton S. Davidson, their stipulators?

3d. If the second question is answered negatively, then should not a final decree have also been entered against the Western Union Railroad Company and William W. Hanley, who also intervened in the same manner, and to the same extent, and by the same Proctors, all joining in one answer to the libel?

These are the questions raised by this appeal, and the manner in which they are raised sufficiently appears by the

ASSIGNMENTS OF ERRORS.

1st Assignment of Error. The Circuit Court erred in not entering a final decree against Henry Lourey, claimant and owner of the Steamboat Lady Pike, and Samuel Marshall, his stipulator, their stipulation and undertaking never having been cancelled, and having been improvidently returned to said Marshall.

2d Assignment of Error. The Circuit Court erred in entering a final decree against said Pearce and Knight, intervenors, and William F. Davidson and Peyton S. Davidson, their sureties, the stipulation

they filed being void, irregularly taken, irregular in form, not required by rules of court or practice, wholly without consideration, and procured by mistake or fraud, as disclosed by the record, and the order for the substitution of this stipulation for the one filed by Lourey and Marshall having been improvidently granted by the court, and beyond the scope of its authority.

3d Assignment of Error. The Circuit Court erred in entering a final decree against said Pearce and Knight, intervenors, and William F. Davidson and Peyton S. Davidson, their stipulators, because their stipulation only bound them to "abide and answer the decree of the *said court*," viz.: the District Court of the United States for the district of Wisconsin, and there has not been any decree in said District Court against them.

See Stipulation, pages 8 and 9, Record.

4th Assignment of Error. If assignments of error, Nos. 2 and 3 are not sustained, then the Circuit Court erred in not entering a final decree against the Western Union Railroad Company and William W. Hanley, who intervened in said cause at the same time and in the same manner that appellants Pearce and Knight did.

5th " Assignment of Errors The Circuit Court erred in entering a final decree against Ephraim D Pearce

BRIEF.

The following authorities are cited in support of the 1st assignment of error, viz.:

Lane vs. Townsend, 1st Ware, 286.

The Ship Empire and cargo, 1 Benedict, U. S. Dist. Court Rep'ts, 19; and

Herman T. Livingston vs. Steamship Jewess, cited in foot note, 21 id.

The Union, 4 Blatchford's C. C. R. 90.

The White Squall, 4 Blatchford's C. C. R. 103.

D. R. Carroll et al. vs. The Steamboat T. P. Leathers, Newbury's Admiralty Reports, 432.

Gaines vs. Travis, 1 Abbott's Admiralty Reports, 297.

The following authorities are cited to sustain the 2d assignment of errors, viz.:

The White Squall, 4 Blatchford, C. C. R. 103.

The following authorities are cited in support of the 3d assignment of errors:

Samuel Whitwell et al. vs. Samuel M. Burnside, 1st Metcalf, 39.

Morgan vs. Morgan, 4 Hill & Johnson's Reports, 395.

McCluskey vs. Cromwell, 11 N. Y. 593.

Charles Sawyer et al. vs. Samuel Oakman et al., 11 Blatchford's C. C. R. 65.

Miller vs. Stewart, 9 Wheaton, 681, or 6 Curtis, 233.

Smith vs. U. S., 2d Wallace, 219.

Leggett et al. vs. Humphreys, 21 Howard, 66.
United States vs. Boyd et al., 15 Peters, 187.
~~*McGill vs. The Bank of the United States, 12 Wheat,*~~
~~*511.*~~ United States vs Boecker 21 Wallace 652
Smith vs Hueseman Central Law Journal Dec 7th 1877
No 23 page 492 (A late case before the Supreme
Court Commission of Ohio)
Ann Caroline 2nd " Wallace 548
The Harriet 1st Robinsons Admiralty Reports 182
Myers et al vs Parker 6th Ohio State Reports 501

The following authorities are referred to as sustaining the 4th assignment of errors:

Carpentier vs. Minturn, 65 Barbour, 295, and authorities there cited.
Allen vs. Malcolm, 12 Abbott's Practice Report, new series, 335.
Mahaney vs. Penman, 4 Duer, 605.
Shields vs. Thomas, 18 Howard, 253.
Watson vs. Cabot Bank, 5 Sanford, 428.
Murray vs. Vanderbilt, 39 Barbour, 148.
The following authorities are referred to
5th Assignment of errors
McGoon vs Ohio 20 Ohio 83
Grant vs Naylor 4 Cranch 224

ARGUMENT.

This case is peculiar in many of its features, and yet the principles relied upon by the appellants are well established by repeated decisions of Courts of Admiralty in this country and in the old world. The peculiar circumstances surrounding this case from its inception to the present hearing, are doubtless owing, in a large measure, to the fact that the proceedings were in an Admiralty Court far inland, where the processes and proceedings of Courts of Admiralty are not often invoked, and where court and counsel were not so familiar with this practice as the courts and counsel who are located adjacent to or upon the seaboard.

There are certain well established principles and modes of procedure that have grown up by centuries of practice in Courts of Admiralty, and these are recognized and acted upon by our tribunals. Some of these are that, in a proceeding *in rem*, after the vessel is actually seized and in the custody of the court, any one who desires to file a claim, must make satisfactory proof of their interest, give a suitable bond for costs, and if they desire the possession of the property, a stipulation with sureties must be filed, which stipulation takes the place of the *rem*, and it is then beyond the power of the court to re-arrest the vessel, except in certain special cases.

In reference to stipulations in proceedings *in rem*, Judge Ware, in an opinion delivered by him in 1835,

gives the following detailed description of the proceedings:

"When a libel is filed *in rem*, whether in a petitiory or possessory suit, a warrant is issued to the marshal, directing him to arrest the thing and hold it in his custody to await the order of the court; and a citation is issued to the person in whose possession it is, and also to all persons claiming any interest in it, to appear and show cause why a decree should not pass in conformity to the prayer of the libel. On the return day, if any one appears as a claimant to defend, he is required, before being admitted to make a defense, to enter into a stipulation for costs—the thing in controversy remaining in the custody of the court. If the claimant wishes to have the possession restored to him, the court will pass an order for its restoration on his entering into an additional stipulatiou, in a sum equal to the value of the thing, to be ascertained by an appraisement, which stipulation, in the further proceedings, becomes a *substitute for the thing itself;* and if judgment passes for the libellant, it is entered on the bond or stipulation, and execution issues accordingly. The stipulation, as well for the costs as for the value of the property in controversy, binds the sureties equally with the principal party for the absolute payment of the amount decreed, and *they cannot discharge themselves by a surrender of the principal."*

Lane vs. Townsend, 1 Ware, 296–7.

In the case at bar, after the seizure of the Lady Pike, her owner, Henry Lourey, desiring to have the

possession restored to him, appeared in court, October 27th (*see page 5, Record*), and having made proper proof of ownership, and having filed a stipulation in the sum of $10,000 (libellants' Proctor having agreed to that sum), a warrant of restitution issued, and the Lady Pike was released from arrest.

That stipulation took the place of the *rem*, and Lourey and Marshall remained there in court to answer any judgment that might be recovered against them by the libellants. If Judge Ware and other learned jurists have correctly stated the law, viz.: "*they* cannot discharge themselves by a surrender of the principal," then is it possible that they can *discharge themselves* by presenting another stipulation, signed by strangers to the record, and asking to have the new stipulation accepted "in lieu" of their own original undertaking?

In reference to Samuel Marshall, we can only say as did Justice McCaleb to the surety in the case of *Montgomery et al. vs. The Leathers*, reported in *Newbury's Admiralty Reports*, 432: "If any injury shall eventually accrue to him in this case, the court can only express regret at its inability to relieve him. It is his own fault if he has failed to exact of his principal a separate stipulation to indemnify him against all loss. (*Page 436 id.*)

If the Lady Pike had remained in the custody of the court, and Mr. Lourey, desiring to recover the possession of his vessel, had brought another steamer to La Crosse, and offered to deliver her "in lieu" of the Lady Pike, although she might have been of far

greater value, and free from all liens, the substitution could not lawfully have been made, and no Court of Admiralty would have considered the proposition for a moment.

The stipulation of Lourey and Marshall did take the place of the *rem*, but there was no power in the court to permit or authorize any farther or additional substitution. The authority of the court in that direction reached its limit when the writ of restitution issued and was carried into effect.

Proctors for appellees will doubtless say, "the court did make the substitution, and are we to suffer thereby?" We answer, the substitution was *improvidently* made by the court, and you still have your remedy and right to a decree against Lourey and Marshall, as the withdrawing of their stipulation did not cancel their undertaking.

We find in the syllabus of the case of "The White Squall," the following: "Where, in a suit *in rem* against a vessel, she was discharged on the usual stipulation for value, and afterwards, during the pendency of the case in this court, on appeal, the respective Proctors consented in writing to a return of the vessel into the custody of the marshal, and to her sale by that officer, and she was sold, and an order was obtained from the Circuit Judge, directing the clerk to enter an order according to such consent. *Held*, on a motion made to vacate such order, by a person who claimed to have an interest in the vessel, and who was not a party to the suit, that the Judge had no jurisdiction or power to make the order."

Judge Nelson in his opinion, says: "I am satisfied that the order made by me was improvidently granted, and that I had no power to make it, and as the question is presented on a motion made by a party who claims to have an interest in the vessel, and who was not a party to the libel or the proceedings in the cause, I shall direct that the order entered upon the filing of the consent of the Proctors for the respective parties be vacated, and that the rights of all persons concerned be left to stand upon the written stipulation entered into by the Proctors.

"The purchaser at the sale of the vessel has appeared and opposed the motion; but, as he had full notice of the proceedings and of the claim that the order of sale was invalid, and would be contested, I perceive no equity entitling him to any particular favor. Indeed were it otherwise, it would not change my decision, as I vacate the order on the ground that I had no power or jurisdiction to make it. Since the granting of the order, I have had occasion to look deliberately into the question as to the power of the court to order back into the custody of the marshal, a vessel which has been fairly discharged from arrest on stipulation."#

The White Squall, 4 Blatchford, 103-4-5.

In reference to the admission of a claimant, the rules of this court prescribe precisely the steps that should be taken, and there is enough left in the Record, after its unauthorized mutilation by the withdrawal of claimant's stipulation from the files, to show that the rule was strictly and fully complied with.

and am satisfied that the court possessed no such power."

"In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof." * *

* * "And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, *or upon an appeal, by the appellate court.*"

Rule 26, in Admiralty.

Did Lourey comply with these requirements? He did. (*See pages 5 and 6, Record.*) His affidavit or proof of ownership required by this rule was probably attached to and part of the same paper upon which the stipulation of himself and Marshall, was written and was doubtless withdrawn with the stipulation when it was surrendered to Marshall.

That he made such proof is shown by the recital in the writ of restitution, which says: * * * "and whereas, also a claim has been interposed and filed in said court by Henry Lourey, *and such proceedings have been thereupon had that, by the sentence and decree of said court in this case*, made and pronounced on the 27th day of October, 1866, the said Steamboat Lady Pike, her boiler, engine, machinery, boats, tackle, apparel and furniture, *was adjudged to belong as claimed.*" * * *

Page 6, Record.

This is the only evidence in the entire Record which discloses any proof of ownership.

It is true that when appellants Pearce and Knight intervened, and the answer of these parties and Hanley and the Western Union Railroad Company was filed, it contained a recital as follows, viz.: "The answer and claim of Christopher G. Pearce, William W. Hanley and William Knight, owners of the Steamboat Lady Pike, intervening, &c.," but this answer was not even verified by any of these alleged owners. It was not preceded or followed up by any proof of ownership, such as is required by Rule 26, and from beginning to end of this entire Record, there is not a word of proof to show that anyone ever had any interest in the Lady Pike, save the proof made by Lourey, which secured the decree of ownership in him, recited in the writ of error. It may be urged that it is wholly immaterial to appellants whether Lourey and Marshall should be held or not, but certainly the Davidsons, who appear alone as sureties, have a right to urge that the status of their responsibility shall not be changed to their prejudice from what it was the day they executed the stipulation which bound them (if they have ever been legally bound). If the court holds that they were bound and became legally liable upon their stipulation, then the degree of their liability was fixed the moment their stipulation was filed in court. The record discloses that their stipulation had already been filed when Mr. Lynde made his motion to substitute their stipulation for the one of Lourey and Marshall. (*See page 8, Record.*) If the surrender of the first

stipulation released the stipulators thereon from liability, then it wholly changed the liability of Davidsons, as sureties. There was but one debt to pay, viz.: the amount that should be found due libellants. There was already a stipulation on file by Lourey and Marshall to pay whatever sum there should be adjudged to be due. The stipulation of the Davidsons, if it had any binding effect and validity at all, was in the nature of additional security. It is fair to presume that the Davidsons acted with a full knowledge of all the facts, and that they gave this bond knowing that *two entirely responsible* men beside their principals stood ahead of them to answer any judgment that might be recovered. If the court will not so presume, and takes the ground that they acted in ignorance of the real facts, then we say that the recital in their stipulation, viz: "And whereas, the said Steamboat Lady Pike is in the custody of the marshal, under the process issued in performance of the prayer of said libel, as appears from said process, now on file in said court," being wholly false, and a fraud upon the Davidsons, that they are thereby released.

The "process on file in this court" did not show any such thing.

The writ of restitution showed, by indorsement thereon of the official return of the marshal, that the Lady Pike was released from arrest, under said process, October 30th, 1866, and the Davidson stipulation was entered into January ~~27th~~, 1867, and it was filed and became operative (if it ever did so become) Feb-

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ruary 8th, 1867,—more than three months after the Lady Pike had been released.

Suppose, instead of a stipulation, the practice of the court and rules had permitted a satisfactorily indorsed conditional note to be deposited in the court, to take the place of the *rem*.

Henry Lourey had given his note for $10,000, indorsed by Samuel Marshall, and the same had been accepted by consent of libellants' Proctor, and the Lady Pike had been released. Three months after, Pearce, Knight, and Hanley, wishing to intervene, had given their conditional note for $16,000, indorsed by the Davidsons, to pay the same debt, and had deposited it with the clerk, in order to obtain the right to intervene. Now, it would be but fair to presume that the Davidsons indorsed this note largely induced thereto, because Henry Lourey had promised by his conditional note, indorsed by Samuel Marshall, to pay the same debt. After both notes are in court, both given conditioned to secure the same debt, viz.: whatever judgment libellants might recover, the Proctor of *Lourey and Marshall* moves the court to substitute Pearce and Knight's note, indorsed by the Davidsons, for theirs, and asks that the note given by the first parties be surrendered to the indorser. That Mr. Lynde was then acting for his first client (Lourey), appears by the record. (*See page 8 of Record.*)

Lourey was the only claimant ever admitted by the court, and the same entry shows that the first stipulation—the one signed by Marshall—"is now returned to him."

This removal of the first stipulation, if it had the legal effect to release Lourey and Marshall, certainly would so change the obligations of the parties to the second stipulation, as to entirely release them.

They have the right to claim that if they are held at all, their liability shall only be what it was the day their stipulation was filed in court.

Under the second assignment, several errors are stated, and all of them we claim are apparent from an inspection of the record.

We call attention to the fact that the stipulation of Pearce, Knight, and the Davidsons, is not an instrument under seal (*see Record, page 9*), and the inducement to the execution of the instrument, as shown by an inspection thereof, must have been the release of the Lady Pike from arrest. The recital that she was in the custody of the marshal, was wholly false, and, so far as the sureties at least were concerned, was fraudulent, and must vitiate any contract they made, based upon a consideration that never moved to them nor to their principals.

The Record discloses the fact that the Lady Pike had been released more than three months prior to the filing of this instrument. If it is claimed that this stipulation was executed and delivered to Mr. Lourey's Proctor for the purpose of being substituted in the files of this case for the original stipulation on which the vessel was released, that knowledge must be proved against the parties who executed it, as there is nothing in the Record to show any such intent.

This was a case where, in a proceeding *in rem*, a

valuable property was represented to be in the custody of the United States Marshal at La Crosse, Wisconsin, under process issued out of the United States District Court for that District, unable to earn freight money, liable to deteriorate in value, and to put parties in interest to heavy expense, and with these inducements moving thereto, they execute and deliver the second stipulation, which, upon its face, discloses the mistake or fraud by which it was obtained. The vessel had long before the execution of the second stipulation been released.

Suppose Pearce, Knight, and Hanley had, or supposed they had, some valid claim against, or lien upon, the boat; they intervened for their interest (as the claimant was already in default), and they chose to dispute the claim of libellants, and they did so, but were unsuccessful. Does that throw upon them the burden of meeting the liability that belonged to her owner, Lourey?

On February 1st, when Lourey's time to answer expired, he was in default, and a judgment might then have been taken against him and his surety.

On February 2d, the intervention of other parties occurred, disputing the right of libellants to recover, and they then chose to await a final decision upon the issues raised by the answer of the intervenors.

When this court reversed the courts below, and remanded the cause for further proceedings, they then were in position to, and should have taken a final decree against the owner and claimant of the Lady Pike (Henry Lourey) and his surety; and if these

intervenors had failed, as they did, to establish their claim to the boat, if they were bound at all, it was only to answer a judgment for whatever costs had been occasioned by reason of their intervention. On October 27th, 1866, the District Court of the United States, for the District of Wisconsin, judicially determined and adjudged the Lady Pike "to belong as claimed," viz.: to Henry Lourey. From that adjudication there never was any appeal or any objection by libellants; but later, when the case was heard upon the merits, and it was decided against libellants, they appealed to the Circuit, and from the Circuit to this court, which, on the merits, reversed the lower courts.

The adjudication below that Lourey owned the Lady Pike and was the proper claimant, remains to this day undisturbed. The Lady Pike has never yet been adjudged to belong to Pearce and Knight, and it would seem a somewhat anomalous position for the court to decree that Lourey was the owner for the purpose of taking possession of her and enjoying her earnings, and that Pearce and Knight were the owners for the purpose of *paying her debts.*

That would be the exact position if Pearce and Knight are held to pay this debt to the libellants. We claim that the Record discloses no ground for requiring these intervenors to pay anything except the costs occasioned by their intervention.

The fact that they continued in court, defended the case, &c., may place them in a position that the court would require this much of them, but the Davidsons never appeared anywhere or did anything except to

execute a stipulation binding themselves to "abide the decree of the said court."

The appeal herein never carried the sureties out of the District Court, and they had no chance to be heard, nor any occasion to be heard, until a final decree was rendered against them.

We maintain that the stipulation of Pearce, Knight and William F. and P. S. Davidson, so far as it is sought to bind them to pay the libellants' claim, on the ground of the release of the vessel, was absolutely void.

If the release of the vessel was the consideration for their contract, it wholly failed. If that was not the consideration, we ask the Proctors for libellants to show where in the Record any other consideration is disclosed.

It was *irregularly taken* because after a vessel is once released on sufficient bond, she cannot be returned to the custody of the court, and it is beyond the power of the court to exact any additional stipulation in reference thereto.

It was *irregular in form*. It does not purport to cause Pearce and Knight to submit themselves to the jurisdiction of the court at all, but only William F. and Peyton S. Davidson, the sureties, submit *themselves* thereto.

It only binds them to "abide and answer the decree of the said court," viz.: of the District Court of the United States for the District of Wisconsin.

It was not *required by the Rules of Court or Practice*, because one claimant's stipulation for an amount agreed

upon had already been filed and acted upon by the court, and the most that could have been required was the usual stipulation from intervenors for a cost bond or stipulation.

It was *without consideration*, because the inducement, viz.: the release of the vessel, had taken place three months prior to the filing of this stipulation; and *fraudulent*, because the state of facts recited therein had no existence in fact, and there is nothing in the Record to show that the stipulators on the second stipulation ever consented that it might be used as a substitute for a valid stipulation already on file. It is fair to presume that it was executed in good faith to procure the release of the Steamboat Lady Pike from the custody of the United States marshal, and was not executed for the purpose of being substituted.

The order for the substitution was *improvidently* granted, and beyond the authority of the court, and hence it was a nullity, and of no more validity in the case as a substitute for the liability of Lourey and Marshall than so much waste paper.

In reference to the responsibility of sureties, the court has repeatedly pronounced opinions, and Justice Clifford, in discussing a question of this kind, uses the following language, which we claim is applicable to the case at bar:

"Responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority, it becomes a new contract, and is invalid, because it is deficient in the

essential element of consent. Where after the execution of a bond by the principal and the surety, conditioned for the performance by the former of his duty as collector in certain townships, the name of another township was added with the consent of the principal, but without that of the surety, this court held in *Miller vs. Stewart, 9 Wheaton, 102*, that the latter was discharged from all obligation, because the duties imposed by the instrument, in its altered state, were not those for the performance of which he had made himself responsible, and that the defect could not be cured by declaring on the condition as it originally stood. Opinion of the court was given in that case by Judge Story, and his remarks upon the subject are decisive of the question under consideration. Indeed nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle, says Chancellor Kent, is well settled, that the case must be brought strictly within the guaranty, and the liability of the surety cannot be extended by implication."

"Liability of a surety, says the court in *McCluskey*

vs. Cromwell, 1 Kernan, 598, is always *strictissimi juris,* and cannot be extended by construction; and this court, in the case of *Leggett et al. vs. Humphrey, 21 Howard, 76,* adopted the same rule, and explicitly decided that a surety can never be bound beyond the scope of his engagement."

United States vs. Boyd et al., 15 Peters, 208.
Smith vs. United States, 2 Wallace, 234–5.

The case of *United States vs. Boecker, 21st Wallace, 652,* was a suit to recover upon a distiller's bond. The law required, among other things, a notice of the *place* at which the business of distilling was to be conducted, and the bond referred to the notice and *place.* The notice was for the carrying on of the business "at the corner of Hudson street and East avenue, situate in the town of Canton," and it was actually carried on "at the corner of Hudson and Third streets," in the same town.

Justice Swayne, in pronouncing the opinion of the court, says:

"Viewing the subject in the light of these considerations, we cannot assent to the view expressed by the counsel for the government. On the contrary, we think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liability must arise, the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No dis-

tillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract. It was as if the agreement had been for the good conduct of a clerk while in the service of B., and the clerk never entered his service, but entered into the service of another. Distilling begun and carried on elsewhere was no more within the obligation of the sureties than if it had been begun and carried on there or elsewhere by a person other than Boecker. No other place than that named is, under the circumstances of this case, within the letter, spirit, or meaning of the bond. The specification has no elasticity. It cannot be made to extend to the locality where the distillery here in question was placed." The case of *Miller vs. Stewart, 9 Wheaton, 703*, is approved.

United States vs. Boecker, 21 Wallace, 656–7.

In the case at bar, Pearce, Knight and their sureties, the Davidsons, bound themselves to answer any decree against them in "said court," viz.: the District Court of the United States for Wisconsin, and none has been rendered against them in that forum, and therefore their bond or stipulation never became operative. If the distiller's bond could not be stretched four squares to cover the identical business, but carried on at a different locality, how can we stretch the stipulation of Pearce, Knight and their sureties to cover a decree in another forum. In the distiller's bond case above quoted, the statutes of the United

States made certain requirements which had not been technically complied with, although it was the obvious intention to cover the business, and the court held it could not go beyond the letter of the contract.

The Rules of this court in Admiralty require stipulations to answer any judgment "which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court." (*26th Rule.*)

The stipulators, Pearce, Knight and Davidsons, did not comply with the Rule, and this court certainly will not extend their liability beyond the letter of their undertaking.

That the Rules of the Supreme Court are binding upon the inferior U. S. tribunals is so plain that it does not require argument, Judge Betts, in the case of *Gardner vs. Isaacson*, (reported in 1st Abbott's Admiralty Reports, 141,) in construing the Rules of U. S. Supreme Court concerning bail or stipulations in suits *in personam*, says: "The act of August 23, 1842, sec. 6, (5 U. S. Stats. 518,) if it confers no more ample powers on the Supreme Court to regulate the practice of the District and Circuit Courts of the United States yet manifestly implies a mandate on the court to perform that duty.

In January Term, 1845, the Supreme Court exercised that power in relation to the practice of all the federal courts in causes of Admiralty and maritime jurisdiction on the instance side of the courts. And accordingly those directions, in respect to *practice*, became the supreme law to all inferior courts, in the particulars regulated by them. (*Page 144 id.*)

* * * "The duty of the inferior court is limited to receiving and executing the law given by its superior." * * * (*Page 150 id.*)

The duty of the inferior court in this case, under the Rule of the Supreme Court, was to exact a different stipulation, and one which would have bound the stipulators to answer any decree of the *appellate courts* herein.

It failed to do so, and we claim that these stipulators shall only answer to the conditions of their bond, if it ever becomes operative.

The stipulators Pearce, Knight and Davidsons might have been willing to stand in court until the District Court had passed upon the merits of the controversy, but their wisdom is shown in declining to be bound for the results in a final decree of the appellate courts.

Over ten years have passed since the execution of the stipulations herein, and circumstances have very greatly changed.

The Davidsons could easily keep in view the issues and trial of a cause in the U. S. District Court of Wisconsin, and if the principals for whom they became sureties became lax in their attention to the case, or were likely to become insolvent, they could institute prompt measures to protect themselves from loss. They were too wise to bind themselves to follow that case to the U. S. Circuit Court, and thence to Washington and back again to Kenosha, Wisconsin, where the final decree was entered.

But whether they were wise or not, cannot affect

their legal rights, and we claim that no liability has yet arisen for them to respond upon their bond, and never will arise until there is a judgment against them in the U. S. District Court of Wisconsin.

The Supreme Court of Massachusetts has determined a case directly in point, and held that a bond given to answer "such costs and damages as the court aforesaid" should adjudge and decree, when the bond was given in the Court of "Common Pleas," did not bind the surety for costs and damages on a decree in the appellate court.

"This was a petition, praying the court to pass a decree that the respondent pay to the petitioners the costs and damages sustained by them by reason of his unsuccessful defense of an action brought and prosecuted by them against David T. Brigham; it appeared that the petitioners sued out a writ of attachment against said Brigham in the Court of Common Pleas, in which his property was attached. It appeared that the respondent being a subsequent attaching creditor of said Brigham, was admitted by said court, on his petition for that purpose duly filed, to defend the petitioners' said action, and thereupon gave bond with sureties to pay to the petitioners, "such costs and damages as the court aforesaid" should "adjudge and decree to have been occasioned to" the petitioners "by such defense so to be made" by the respondent. The said action was taken to the Supreme Judicial Court by appeal, and after a hearing, judgment was rendered in favor of the petitioners, and an execution issued against Brigham, who was insolvent."

Judge Dewey, in the opinion, says: "The foundation of this proceeding, and the only ground for an adjudication against the respondent, is a bond executed by him, and filed in the Court of Common Pleas, at the time he was permitted to assume, as a subsequent attaching creditor, the defense of the petitioners' action against Brigham; and it is supposed by the petitioners that this bond authorizes an action against the respondent, to recover such costs and damages as this court shall now decree to have been occasioned to the petitioners by the said defense to that action by the respondent. But upon examination of that bond, it seems to us fatally defective as the foundation of any action, or any judgment by this court upon the subject submitted to us. The condition of the bond is for the payment of all such costs and damages as the *Court of Common Pleas* shall adjudge and decree to have been occasioned, &c. We cannot extend the obligation of the respondent and his sureties beyond the plain and direct terms of the bond."

Whitwell et al. vs. Burnside, 1 Metcalf, 39 and 42.

Judge Allen, speaking of the liability of sureties, says: "The principle is well settled, that a surety is not held beyond the fair scope of his engagement, and that, in contracts of suretyship, above all other contracts, the meaning of words and phrases is not to be extended to the prejudice of the surety, but that words shall be taken to have been used in their ordinary sense. In other words, the liability of sureties is

always *strictissimi juris*, and shall not be extended by construction."

McCluskey vs. Cromwell, 1 Kernan, 598.

"After a bond has been given to the marshal, pursuant to the rules of the Supreme Court, the libellant has no power to exact any additional stipulation from the respondent."

Abbott's Admr.: Gaines vs. Travis, 299.

If assignments of error two and three are not sustained by this court, then we insist that a final decree should also be ordered against the Western Union Railroad Company and William W. Hanley.

If Pearce and Knight are to be held by reason of their having intervened for their interest therein, we see no possible reason for leaving out these other parties. On February 2d, 1866, after the owner and claimant of the Lady Pike was in default, and it became apparent that for some reason he had abandoned a defense, these other parties all employed one firm of Proctors to enter their appearance, file their joint answer, and defend the suit. The reason for the voluntary appearance of the Western Union Railroad Company is apparent on inspection of the Record.

The contract to transport the 20,000 bushels of wheat from Shakopee to Chicago was a "through" contract, and any one of the carriers that had made that contract could be made liable for non-performance, unless they could show a satisfactory and lawful excuse for not doing so.

If in this proceeding they had not intervened at all, and the libellants had obtained a decree against the Lady Pike alone (or Lourey and Marshall, who took her place in court), they would have had a right of action against the Western Union Railroad Company for contribution.

In a certain sense, the Lady Pike and Western Union Railroad Company was engaged in a joint venture, and *in law*—as they were to share the profit —they would also have to share the loss.

That the Western Union Railroad Company owned the three barges—Salmon, Trout, and Widgeon—is shown by the copies of their enrollments (*see pages 30, 31, and 32, Record*) and by additional testimony of other witnesses.

Wm. H. Anderson says: "I made a contract with the officers of that boat to carry wheat for me from Shakopee to Chicago."

Anderson's deposition, page 29, Record.

Captain A. C. Monfort, Master of the Lady Pike, says:

"*Question.* At the time you entered into this verbal contract you speak of, was the price and the taking of it in bulk in barges agreed upon, and state whether or not you went up for it according to that agreement, and at what prices?

"*Answer.* I went up to Shakopee exclusively for that purpose, and the price agreed upon was twenty cents per bushel to Chicago.

"*Ques.* Was the Western Union Railroad Company, with whose agent you left the wheat, the company which was to do the land transportation of the grain?

"*Ans.* It was to go over the Western Union Railroad line to the junction, thence to Chicago to the Northwestern Elevator."

Monfort's further deposition, page 63, Record.

The damaged cargo and the wrecked barge was left in the charge of an agent of the Western Union Railroad (so states Monfort, near the top of page 63, Record). The Salmon was repaired by the Western Union Railroad.

"*Ques. 8.* What did it cost to repair that barge, and who did repair it?

"*Ans. 8.* It was repaired by the *owners* of the barge, at Savanna."

Monfort's first deposition, page 59, Record.

J. Pursinger, mate of the Lady Pike, says: "We took the barges up with us from Savanna."

See answer 15, near top of page 61 of Record, of Pursinger's deposition.

If the answer of the intervenors, by its allegations, binds any of them, it binds all; and in the third article it is alleged—

"That on or about the 21st of April, the said Steamer Lady Pike was lying at Reed's Landing, at

the foot of Lake Pepin, with three barges in tow of said boat, belonging to the Western Union Railroad Company, and bound for the Minnesota river; that the captain of said steamboat, A. C. Monfort, then made an arrangement with one T. J. Duffy, by which the said barges were to be loaded with the wheat in bulk by him, and be carried therein, the said steamer towing the same from Shakopee to Savanna, and from there the said wheat was to be carried forward to Chicago by said Western Union Railroad Company, all at twenty cents per bushel."

See Intervenors' answer, page 7, Record.

Now, if the Western Union Railroad Company owned and furnished the three barges to carry this wheat in, and was a party to a through contract of affreightment at twenty cents per bushel, and did carry all the grain that was not lost, and received its pro rata share of the compensation agreed upon, it was liable to respond in damages upon an action for breach of the contract. It is true that the monition issued against the barge Salmon, but for some reason the process was not served upon that vessel at the same time that it was upon the Lady Pike.

The Western Union Railroad Company being fully advised of its joint liability with the other carrier, that a monition had issued for service upon its property, the barge Salmon, voluntarily appeared in court, and joining with the other intervenors, Pearce, Knight, and Hanley, filed an answer to the libel, and formed issues, upon which the case went to trial.

The process that issued was *in rem*, and was to bring the offending things into court. One of them was seized, and the owner came in and substituted his own and Marshall's stipulation; so nothing remained to bring anyone else into court.

But the interest of the railroad company is apparent from the record, and they decided to appear voluntarily. It does not appear what interest Pearce, Knight, and Hanley had to bring them in, but for some reason they also decided to intervene, and all these five parties did intervene by one set of Proctors, and filed a joint answer.

The cause was decided against libellants, and they took an appeal to the Circuit Court, when, upon its affirmance, they again appealed to this tribunal.

On reversal by this court, in December, 1874, it was remanded to the Circuit Court, to enter a decree in accordance with the opinion of the Supreme Court.

In all the proceedings, from the day the answer was filed, February 2d, 1866, the Western Union Railroad Company and William W. Hanley were regarded as being in court just as much as Pearce and Knight.

See decree, C. C., page 119, Record.

When the libellants gave their appeal bond to this court, they bound themselves in a sum "to be paid to the said Christopher G. Pearce, *William W. Hanley*, and William Knight, and the *Western Union Railroad Company.*"

See libellants' appeal bond, page 120, Record.

When this case was here before, the Supreme Court seemed to have regarded both these parties as being in court. The mandate directs that the libellants "recover against the said *respondents and appellees* two hundred and forty-one dollars and ninety-nine cents for their costs herein expended, and have execution therefor."

See mandate, page 122, Record.

When the case got back to the Circuit Court, and an order on the mandate referring the case to a Master &c., was made, it was then construed to include Hanley and the Western Union Railroad Company, and ~~we are informed that~~ execution for these costs did issue from ~~this~~ said court, and the Western Union Railroad Company paid the same. ~~If such be the fact, we refer~~ to the return of the U. S. marshal who ~~collected~~ the same upon the ~~execution~~ in this court, as it is a part ~~of the records of which the court will take notice~~.

If the Western Union Railroad Company did not recognize the fact that they were there as one of the "*respondents and appellees*," why did they not interpose by a motion in ~~their~~ court, to have the execution against them recalled, and to correct the record of a final decree against them for costs?

The Railroad Company and Hanley both voluntarily appeared. The interest of the former is manifest on the Record; the latter appeared with Pearce and Knight, without any cause therefor being disclosed in the Record, but when a final decree comes to be entered in the Circuit Court, the Western Union Rail-

road Company and William W. Hanley are both omitted, and a decree entered against one Ephraim G. Pearce and William Knight and their sureties.

If voluntary appearance bound any of the intervenors, it certainly bound all, and if Pearce, Knight and their sureties William F. Davidson and Peyton S. Davidson, are to be held, both law and equity demand that the Western Union Railroad Company and William W. Hanley should also be held.

We urge upon the court that the present appellants are entitled to have the decree against them unconditionally reversed, and if our views are sustained, it is immaterial to us what other decree affecting the interests of libellants is directed, but if the court is not satisfied to do so upon the evidence contained in the Record, then we insist that a decree should be directed against Henry Lourey and Samuel Marshall, his surety, and the Western Union Railroad Company and William W. Hanley.

The case has, at least, been badly blundered, and *mistake*, if not *actual fraud*, is manifest upon the face of the Record. If the facts are not sufficiently disclosed by the Record to justify specific directions to Circuit Court as to the form of its decree, we ask that the case be reversed and remanded for such other and further proceedings "as according to right and justice and the laws of the United States ought to be had."

Respectfully submitted,

JAMES H. DAVIDSON and
WILLIAMS & DAVIDSON,
Proctors for Appellants.

IN THE

Supreme Court of the United States.

No. 198.—October Term, 1877.

CHRISTOPHER G. PEARCE and WILLIAM KNIGHT, Claimants of the Steamboat Lady Pike; WILLIAM F. DAVIDSON and PEYTON S. DAVIDSON, their Stipulators, Appellants,

vs.

THE GERMANIA INSURANCE COMPANY,
THE NIAGARA INSURANCE COMPANY,
THE HANOVER INSURANCE COMPANY, and
THE REPUBLIC INSURANCE COMPANY.

Brief of Counsel for the Western Union Railway Company in support of Decree.

WM. P. LYNDE,

Counsel.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

IN THE

Supreme Court of the United States.

No. 198.—October Term, 1877.

Christopher G. Pearce and William Knight, Claimants of the Steamboat Lady Pike; William F. Davidson and Peyton S. Davidson, their Stipulators, Appellants,

vs.

The Germania Insurance Company, The Niagara Insurance Company, The Hanover Insurance Company, and The Republic Insurance Company.

Brief of Counsel for the Western Union Railroad Company.

It may be entirely unnecessary that the Western Union Railroad Company should ask to be heard in this case, as it is not made a party to this appeal; but it having been made an appellee in the original case, if anything should arise to affect in any way its interest, we ask to be heard in support of the decree in the court below.

Statement.

This is an appeal from a decree entered in the Circuit Court of the United States for the Eastern District of Wisconsin, at the July term, 1875, in pursuance of a mandate issued by this court in the case of The Lady Pike, reported in the 21 Wall., 1.

The mandate is as follows:

"UNITED STATES OF AMERICA, *ss:*

"The President of the United States of America to the Honorable the Judges of the Circuit Court [SEAL.] of the United States for the Eastern District of Wisconsin, greeting:

"Whereas, lately, in the Circuit Court of the United States for the Eastern District of Wisconsin, before you, or some of you, in a cause between The Germania Insurance Company, The Niagara Insurance Company, The Hanover Insurance Company, and the Republic Insurance Company, libellants and appellants, and The Steamboat Lady Pike, her boats, &c., and The Barge Salmon, Christopher G. Pearce, William W. Hanley, and William Knight, claimants of said steamboat, and The Western Union Railroad Company, claimant of said barge, respondents and appellees, wherein the decree of the said circuit court entered in said cause on the 22d day of April, A. D. 1871, is in the following words, viz: 'This day came the parties, by their counsel, and, on consideration of this cause and the arguments of counsel, it is ordered by the Honorable Thomas Drummond, circuit judge, that the decree of the district court dismissing the libel herein be, and hereby is, affirmed, and that the libellants pay the costs in this cause to be taxed, together with the costs of the district court, taxed at four hundred and fifty-five dollars and sixty cents, within ten days, or in default thereof, that an execution be issued against them and their stipulators for the same, as by the inspection of the transcript of the record of the said circuit court which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.'

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-four, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

"On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said libellants and appellants, The Germania Insurance Company et al., recover against the said respondents and appellees two hundred and forty-one dollars and ninety-nine cents for their costs herein expended, and have execution therefor.

"*And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to enter a decree for the libellants, and for further proceedings to be had therein in conformity with the opinion of this court.* 7 *December*, 1874.

"*You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.*

"Witness the Honorable Morrison Waite, Chief Justice of the said Supreme Court, the twenty-fifth day of January."

On the presentation of the mandate the circuit court made the following order—page 123 of Record:

"Whereupon it is ordered by this court now here that the libellants have execution against Christopher G. Pearce, William W. Hanley, and William Knight, claimants of the steamboat Lady Pike, and Western Union Railroad Company, claimant of the barge Salmon, and William F. Davidson and Peyton S. Davidson, stipulators, for the said sum of two hundred and forty-one dollars and ninety-nine cents, costs of the Supreme Court, and that a decree be made for the libellants, and that it be referred to Edward Kurtz, a master of this court, to ascertain and report the amount said libellants should recover in this cause."

Under and in pursuance of this order the master took testimony and heard the parties by their counsel, and reported as follows:

"Amount of insurance paid by libellants, on the 6th day of July, A. D. 1866, on cargo of wheat shipped on board the steamboat Lady Pike and barge Salmon, and afterwards sunk and totally lost on the 24th day of April, 1866, as mentioned in the libel in this cause..... $8,100 00
Interest from July 6th, 1866, to June 28th, 1875,
8 years, 11 months, and 22 days, at 7 per cent. 5,090 00

Amount due libellants at this date, June 28th,
1875 .....$13,190 00

"EDWARD KURTZ, *Master*."

Exceptions were filed to master's report by claimants, which were subsequently withdrawn.

At the July term, A. D. 1875, to wit, on the fourteenth day of July, A. D. 1875, final decree was entered, as follows:

"This day came the claimants, by their proctors, and withdrew their exceptions to the master's report.

"Whereupon, on motion of Cotrell and Cary, proctors for libellants, it is ordered by the court that said master's report be, and hereby is, confirmed.

"And it is considered by this court now here, that the libellants do have and recover of the claimants, Ephraim G. Pearce and William Knight, and William F. Davidson and Peyton S. Davidson, their stipulators, the sum of thirteen thousand one hundred and ninety dollars and forty cents, the amount so reported due by the master, together with their costs about their said suit in this behalf by them expended, and in default of the payment of the same within ten days, that they have execution for the same.

"D. Davis, *Judge*."

The stipulation on which decree was entered is on pages 8 and 9 of record, and reads as follows:

"Stipulation.

"District Court of the United States for the District of Wisconsin. In Admiralty.

"Whereas a libel was filed on the ninth day of October, in the year of our Lord one thousand eight hundred and sixty-six, by the Germania Insurance Company, the Niagara Insurance Company, the Hanover Insurance Company, and the Republic Insurance Company against the steamboat Lady Pike, for the reasons and matters in the said libel mentioned; and whereas the said steamboat Lady Pike is in the custody of the marshal under the process issued in pursuance of the prayer of said libel, as appears from said process, now on file in said court:

"Appearing personally Ephraim G. Peirce and William Knight, represented by William Hull, their attorney, as the claimants of said steamboat, and produced for sureties William F. Davidson and Peyton S. Davidson, and the said William F. Davidson and Peyton S. Davidson, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of sixteen thousand dollars unto the said libellants,

that the said William F. Davidson and Peyton S. Davidson shall abide and answer the decree of the said court in the aforesaid cause, and, unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wheresoever the same may be found, to the value of the sum above mentioned.

"E. G. PIERCE & WILLIAM KNIGHT,
"By WILLIAM HULL, *their Atty.*
"WM. F. DAVIDSON.
"P. S. DAVIDSON."

To which Wm. F. Davidson and Peyton S. Davidson justified before Cyrus K. Lord, U. S. court commissioner.

On the 2d day of September, 1876, Christopher G. Pearce and William Knight, William F. Davidson and Peyton S. Davidson, prayed an appeal from the above decree, as follows (p. 127 of record):

"And now, on this 2d day of September, A. D. 1875, come Christopher G. Pearce, William Knight, William F. Davidson, and Peyton S. Davidson, *as against whom alone* final decree was pronounced on the fourteenth day of July, A. D. 1875, in the above-entitled cause, for the sum of thirteen thousand one hundred and ninety dollars and forty cents, besides costs; the decree herein having been rendered and pronounced as against the said Christopher G. Pierce, by the name of Ephraim G. Pearce, and pray an appeal from said decree to the Supreme Court of the United States."

The appeal was allowed by the circuit judge on the same day.

POINTS AND AUTHORITIES.

I.

Has the court below obeyed the mandate of this court?

1st. "It was ordered by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said libellants and appellants, The Germania Insurance Company et al., recover

against the said respondents and appellees two hundred and forty-one dollars and ninety-nine cents for their costs herein expended, and have execution therefor."

This was literally obeyed by the order made by the circuit court on the presentation of the mandate, as follows (p. 123 of record): "Whereupon it is ordered by this court now here that the libellants have execution against Christopher G. Pearce, William W. Hanley, and William Knight, claimants of the steamboat Lady Pike, and the Western Union Railroad Company, claimant of the barge Salmon, and William F. Davidson and Peyton S. Davidson, stipulators, for the said sum of two hundred and forty-one dollars and ninety-nine cents, costs of the supreme court."

II.

2. It was further ordered by this court "that this cause be, and the same is hereby, remanded to said circuit court with directions to enter a decree for the libellants, and for further proceedings to be had therein in conformity with the opinion of this court, 7 December, 1874. You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

This was literally obeyed by the entry of the decree in favor of the libellants for the amount found due by the master and confirmed by the court against the claimants of the Lady Pike and their sureties on the stipulation filed for the release of the steamboat.

The libel was filed against the steamboat Lady Pike and the barge Salmon. The monition was served on the Lady Pike alone, the barge Salmon having been sunk and lost.

This court say, in its opinion in this case, 21 Wall., 17: "*Service was not made in this case upon the barge, and of course the decree must be founded upon the fault of the steamer and those*

who were responsible for the unskillfulness and bad judgment exercised in her navigation."

The Western Union Railroad Company had inadvertently been inserted in the answer as claimant of the barge Salmon, but it did not sign the answer, and no one signed the answer for it. The answer was signed by C. G. Pearce for himself and other owners, which by reference to the commencement of the answer shows is meant the other owners of the steamboat Lady Pike, and this court expressly says its decree is founded upon the fault of the Lady Pike alone.

The Western Union Railroad Company entered into no stipulation, for it had no property in the custody of the marshal to be released. This being a proceeding *in rem*, no decree could be rendered, except against the property in the custody of the court or the stipulators whose stipulation stands in the place of the property.

In The Kalamazoo, 15 Jurist, 885, Dr. Lushington says: "I cannot think that I can engraft a personal action upon an action *in rem*."

Williams & Bruce Ad. Pr., 211.
The Thales, 10 Blatch., 203.
The Ann Caroline, 2 Wall., 538.
The Steamer Webb., 14 Ib., 417.

In The Union, 4th Blatch., 90, Judge Nelson says: "It is to be remembered, in the first place, that this is a proceeding *in rem*; the owners appearing to defend as claimants, on entering into the usual stipulation. *Therefore, no decree can be rendered personally against them, except as stipulators in the suit*, and of course only to the amount provided for in their stipulation. Hence, the decree in this case, so far as affects the owners personally, is properly limited to that amount, *and also to the two owners, Spofford and Tileston, who were the only parties to the stipulation.*"

In Lane vs. Townsend, 1 Ware, 300, Judge Ware says: "If the claimant wishes to have the possession restored to

him the court will pass an order for the restoration on his entering into an additional stipulation, in a sum equal to the value of the thing, to be ascertained by an appraisement, which stipulation in the further proceedings becomes a substitute for the thing itself; and if judgment passes for the libellant it is entered on the bond or stipulation and execution issues accordingly."

In all respects, then, the decree was entered in obedience to the mandate of this court, and the only decree that could be entered in the case according to the well-settled practice in courts of admiralty in this country and in England.

WM. P. LYNDE,

Advocate for the Western Union Railway Company.

Supreme Court of the United States.

No. 198.

CHRISTOPHER G. PEARCE AND WM. KNIGHT, CLAIMANTS OF THE STEAMBOAT LADY PIKE, WILLIAM S. DAVIDSON AND PEYTON S. DAVIDSON, THEIR STIPULATORS, APPELLANTS,

vs.

THE GERMANIA INSURANCE COMPANY, THE NIAGARA INSURANCE COMPANY, THE HANOVER INSURANCE COMPANY, AND THE REPUBLIC INSURANCE COMPANY.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

ABSTRACT OF PLEADINGS.

CHAS. W. JONES,
Of Counsel for Appellees.

Judd & Detweiler, Prs.

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ABSTRACT OF PLEADINGS.

The libellants, the appellees, presented their libel against the steamboat Lady Pike, her boilers, engine, tackle, &c., and the barge Salmon, to the district court of Wisconsin, on the 9th of October, 1866, in which they alleged:

First. That the Lady Pike and Salmon were enrolled and licensed for the coasting trade, and were each engaged in the business of commerce and navigation, &c.

Second. That each of the libellants is a corporation organized under the laws of the State of New York.

Third. That on the 24th day of April, 1866, one William H. Anderson was owner of 6,753$\frac{25}{60}$ bushels of No. 1 spring wheat, at the port of Shakopee, on the Minnesota river, and, upon that day, procured one T. J. Duffy to enter into a contract with one A. C. Mountford, then master of said steamer and barge, in consideration of certain freight to be paid therefor, to transport said wheat from said Shakopee to Savannah, upon the Mississippi river, in the State of Illinois, to be transported thence to Chicago, in said State of Illinois.

Fourth. That thereupon said Anderson delivered said wheat to said Mountford, to be by him so transported. The said Mountford, as said master, received said wheat, and put the same upon board said steamer and barge, the said barge being used in connection with said steamer as part of her equipment, and executed and delivered to said Duffy a bill of lading acknowledging the shipment of said wheat in good condition for account, and at risk of whom it might concern, and undertaking to deliver said wheat without delay, &c., "unavoidable dangers of the river and fire only excepted." That afterwards, and upon said 24th of April, the said steamer, having said barge in tow, and having said wheat aboard, left Shakopee, aforesaid, and proceeded on their voyage to Savannah, aforesaid, but said Mountford, master, as aforesaid, not regarding his duty, &c., although no dangers of the river or fire prevented him from so doing, but, on the contrary, so negligently and carelessly conducted himself, &c., that said wheat was wholly lost and said barge sunk in the Mississippi river.

That after said Anderson had so caused said wheat to be shipped, as aforesaid, he applied to libellants, who were doing business as insurers, under an agreement to divide their risks and premiums, to insure said grain during said voyage, which the libellants did, each for itself in proportion of one-

fourth to each, but in one policy, insure said Anderson in the sum of eighty-one hundred dollars, upon said wheat, and executed and delivered to him a proper contract therefor.

That by reason of such insurance and such loss, the libellants were obliged to pay and did pay said Anderson the said sum of eighty-one hundred dollars so insured upon said wheat, which payment was made on the 3d of July, 1866, and thereupon the said Anderson executed and delivered unto the libellants an agreement subrogating them to all claim which he had against the respondent.

The libellants claimed damage in the said sum of eighty-one hundred dollars, with interest from July 6, 1866. (Fols. 2 and 3.)

An order for process was made by the court (Fols. 4 and 5) whereupon the marshal on the 18th of October, 1866, attached the Lady Pike, her boilers, engines, tackle, &c., but service was not made upon the barge Salmon. (Fol. 5.)

On the 27th of October, 1866, Henry Lowrey, as claimant of the Lady Pike, filed his stipulation, with Samuel Marshal as surety, and a warrant of restitution was thereupon issued to restore said steamboat to said claimant. (Fols. 5 and 6.)

On the 2d of February, 1867, C. G. Pearce, William W. Hawley and William Knight, owners of the Lady Pike, and the Western Union Railroad Company, owners of the barge Salmon, intervening, &c., filed their claim and answer, as follows:

First. They admit the facts set out in the first article of the libel.

Second. They have no knowledge, information or belief, and no means of knowledge, as to the facts set out in the second article of libel, and require proof.

Third. That on or about the 21st April, the Lady Pike

was laying at Reid's Landing, at the foot of Lake Pepin, with three barges in tow of said boat, belonging to the Western Union Railroad Company, and bound for the Minnesota river; that the captain of said steamboat, A. C. Mountford, then made an arrangement with one T. J. Duffy, by which the said barges were to be loaded with wheat in bulk by him, and be carried therein, the said steamer towing the same, from Shakopee to Savannah, and from there the said wheat was to be carried to Chicago by said Western Union Railroad Company, all at 20 cents per bushel; that said steamer with the said barges proceeded to Shakopee, where said Duffy, or some one acting for him, caused the said three barges to be loaded with wheat in bulk; that claimants do not know how much wheat was placed by said shippers in the barge Salmon, but suppose the amount alleged in the libel to be correct. They further allege that said wheat was to be thus transported in bulk in said barges so loaded by the shipper, and that the consignors received the bill of lading to that effect; that none of said wheat was shipped on said boat, but it was agreed and understood to be taken by said steamboat in the barges in bulk; that the said boat was not prepared for or fit to take wheat on board of it in bulk, as was known to said Duffy and the shipper.

Fourth. Claimants allege that said steamboat and barges were in good condition and proceeded on said trip with all possible care, caution and skill; that when passing through the piers raised in the Mississippi river, in the upper end of St. Paul's, in the usual way, and while in the usual channel for such passage, the said steamer and barges were by a sudden gust of wind, blown to the larboard, so that said barge Salmon struck the pier on that side and was sunk thereby; that said steamboat and barge were fully manned and equipped, and in all respects river-worthy, and were skillfully managed at the time of said injury, and that said sinking and consequent loss was an unavoidable danger of the river. The claimants deny negligence. They further allege that

said sunken barge and wheat was taken due care of by proper parties until the same was received by said Duffy, his agents and assigns, and a large part thereof saved, and a still larger part thereof should have been saved by them. They allege that said loss was not caused in any respect by any want of care, skill, or other improper conduct by them or their agents, and they deny that they are liable therefor.

Fifth. They deny knowledge of insurance of the libellants, and require proof. They knew it was insured, but by whom and for whom they have no knowledge, nor have they any knowledge of the payment of the insurance money by libellants, and require proof; nor have claimants any knowledge of any damage suffered by libellants, and require proof. (Fols. 7 and 8.)

The court, on the 8th of February, 1867, ordered that a stipulation that day filed by *Ephraim* G. Pierce and William Knight as claimants of said steamboat, with William F. Davidson and Peyton S. Davidson as sureties, in the sum of sixteen thousand dollars, be substituted for and be in lieu of the stipulation of Samuel Marshall, on file in this cause. (Fols. 8 and 9.)

Depositions were taken, and the cause came on for hearing on the 12th of June, 1869, (Fol. 9,) and on the 6th of July, 1869, the court rendered a decree dismissing the libel. (Fol. 108.) The libellants thereupon prayed an appeal to the circuit court of the United States for the district of Wisconsin. (Fol. 109.) The cause came on for hearing in the said circuit court, when additional testimony was heard by the court. (Fol. 110.) On the 22d of April, 1871, a decree of the circuit court, affirming the decree of the district court, dismissing the libel, was entered, from which decree the libellants took an appeal to this Court. (Fols. 122 and 123.) The cause came on to be heard in this Court in the term of October, 1874, when this Court ordered and decreed as follows:

"On consideration whereof it is now here ordered, adjudged, and decreed by this Court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and that the said libellants and appellants, the Germania Insurance Company *et al.*, recover against the said respondants and appellees two hundred and forty-one dollars and ninety-nine cents for their costs herein expended, and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to enter a decree for the libellants, and for further proceedings to be had therein, in conformity with the opinion of this Court, 7th December, 1874." (Fols. 125, 126, and 127; 21 Wallace, 1.)

Whereupon, at a special term of said Court, on the 12th of May, 1875, it was ordered that libellants have execution for said costs against the claimants and their stipulators of the Lady Pike, and the claimants of the barge Salmon, and that a decree be made for libellants, and that it be referred to a master to ascertain and report the amount said libellants should recover in this cause. (Fol. 128.) Accordingly, the master took testimony, and on the 28th of June, 1875, reported to the Court the sum of $13,190.40 principal and interest, as amount due libellant at that date. Exceptions were filed to the master's report by the proctors of respondents, but were afterwards withdrawn, and on the 14th of July, 1875, judgment was entered for libellants for the sum reported due by the master, besides costs, against the claimants of the Lady Pike and their stipulators. (Fols. 129, 130, 131, 132, 133, 134, 135, and 136.)

An appeal from this decree was prayed, on 2d of September, 1875, by *Christopher* G. Pierce, William Knight, William F. Davidson, and Peyton S. Davidson, the said Christopher G. Pierce alleging that the decree was rendered against him by the name of *Ephraim* G. Pierce, which appeal was allowed, and thus the case comes again to this Court. (Fol. 140.)

Points.

I.

We have made the abstract of pleadings as full as it is, so that the Court may see at once the questions which were adjudicated when the cause was here before. This is necessary to a proper understanding of what is now before the Court. The points of the decision upon the former appeal are thus stated in the syllabus of the case as reported, 21 Wallace, 1:

1. Though on appeals in admiralty, involving issues of fact alone, this Court will not, except in a clear case, reverse where both the district and the circuit court have agreed in their conclusions, yet in a clear case it will reverse even under such circumstances.

2. The master of a steamer which undertakes to tow boats up and down a river where piers of bridges impede the navigation, is bound to know the width of his steamer and their tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether, at high water, his steamers and their tows will safely pass over an obstruction, which, in low water, they could not pass over.

3. The owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge on the part of their captains of the difficulties of navigation in the river in which the steamers ply.

It will thus be seen that every question presented by the record necessary for a decision in favor of the libellants upon the merits of the case was passed upon by this court in the former appeal. The learned justice in delivering the opinion of the Court, after an exhaustive review of these questions, says in conclusion:

"Service was not made in this case upon the barge, *and of course the decree must be founded upon the fault of the steamer and those who were responsible for the unskillfulness and bad judgment exercised in her navigation.*

"Decree reversed, with costs, and the cause remanded, with directions to enter a decree for the libellants, and for further proceedings in conformity."

The mandate of this Court was presented to the court below, and in obedience thereto, a decree was entered against the claimants of the Lady Pike and their stipulators and the claimants of the barge Salmon, the appellees in the former appeal, for the costs of this Court. It was also ordered that a decree be made for the libellants and that it be referred to a master to ascertain and report the amount libellants should recover. Upon the coming in of the master's report, upon proper notice, a final decree for the amount found to be due libellants was entered against the claimants of the Lady Pike, and their stipulators, according to their stipulation, and in obedience to and conformity with the mandate of this Court. From this decree this appeal is taken.

Second appeals or writs of error are allowed, but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original decree or judgment. It is not competent for this Court, after the term has expired, to review and reverse a judgment or decree, where the case has been disposed of upon the merits.

Tyler *vs.* Maguire, 17 Wallace, 283, and authorities there cited.

II.

The mandate of this Court directed that judgment for costs be entered in favor of the libellants and against the appellees, which was done. It then further directed that a decree for the libellants be entered and further proceedings had, "in conformity with the opinion of this court"; that is,

that a decree be entered against the Lady Pike, or the claimants and their stipulators, which was also done. Consequently, the libellants having followed the mandate of this Court in the proceedings below subsequent thereto, three can be no error.

III.

When a libel is filed *in rem*, whether in a petitory or possessory suit, a warrant is issued to the marshal, directing him to arrest the thing and hold it in custody to await the order of the court, and a citation is issued to the person in whose possession it is, and also to all persons claiming an interest in it, to appear and show cause why a decree should not pass in conformity to the prayer of the libel. On the return day, if any one appears as a claimant to defend, he is required, before being admitted to make a defence, to enter into a stipulation for costs, the thing in controversy remaining in the custody of the court. If the claimant wishes to have the possession restored to him the court will pass an order for its restoration on his entering into an additional stipulation in a sum equal to the value of the thing, to be ascertained by appraisement, which stipulation in the further proceedings becomes a substitute for the thing itself; and if judgment passes for the libellant, it is entered on the bond or stipulation, and execution issues accordingly. (Lane *vs.* Thompson, *et al.*, 1 Ware, 300.) In such proceeding no decree can be rendered *personally* against the claimants of the thing or their stipulators. It is not competent to engraft upon a proceeding where the thing remains in the custody of the court, a further proceeding against the owners, upon the ground that the proceeds of the thing proceeded against have been insufficient to answer the full amount of the damages pronounced for. (The Hope, 1 W. Robinson, 158.) Nor is it competent to render a decree *in*

personam against stipulators, except as stipulators in the suit, and then only for the sum named in the stipulation, although the damages claimed and ascertained to be due may exceed that sum.

4 Blatchford, 90.
The Ann Caroline, 2 Wallace, 538.
The Steamer Webb, 14 do., 417.

The Lady Pike was served; the barge Salmon was not served, nor was any stipulation filed by the owners, and in the language of this Court, "of course the decree must be founded upon the fault of the steamer and those who were responsible for the unskillfulness and bad judgment exercised in her navigation."

There is no error in the record.

CHAS. W. JONES,
Of Counsel for Appellees.